92-1045

No.

Supreme Court, U.S.
FILED
FEB 25 1992
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

October Term, 1991

WILLIAM KENT McCOLLUM,
Petitioner,

versus

STATE OF GEORGIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

PETITION FOR WRIT OF CERTIORARI

ROBERT G. FIERER
Attorney for Petitioner
152 Nassau Street, N.W.
Atlanta, Georgia 30303
404/688-5500

QUESTION PRESENTED FOR REVIEW

I. Whether Petitioner was stripped of his fundamental right to a trial by jury when he was tried solely by a Judge who failed to determine if Petitioner had voluntarily and intelligently waived his right to a jury trial.

CERTIFICATE OF INTERESTED PERSONS

Trial Judge:

The Honorable Shepherd Howell
Superior Court of Bartow County, Georgia

District Attorney:

Darrell Wilson
Mickey Ray Thacker
Cherokee Judicial Circuit

Petitioner and Attorneys:

William Kent McCollum, Petitioner
William T. Elsey, Trial counsel
Robert G. Fierer, Appellate counsel

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

OPINION BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS 3

STATEMENT OF FACTS 4

STATEMENT OF THE CASE 7

ARGUMENT 8

CONCLUSION 14

CERTIFICATE OF SERVICE 15

APPENDIX 16

TABLE OF AUTHORITIES

Cases:

McCarthy v. United States, 394 U.S. 459 (1969).....12

Patton v. United States, 281 U.S. 276 (1929).....10

Roberts v. Greenway, 233 Ga. 473,
211 S.E.2d 764 (1975).....9, 10

Singer v. United States, 380 U.S. 24 (1965) 8

Other:

Georgia Constitution 8

U. S. Constitution 8

OPINION BELOW

Petitioner was convicted in a nonjury trial of Driving Under the Influence, Fleeing and Eluding and Reckless Driving in the Superior Court of Bartow County, Georgia, on December 17,1990. A Motion for New Trial was filed on December 21,1990, and denied, after a hearing, on January 31,1991. The Georgia Court of Appeals affirmed Petitioner's Petition on September 25,1991. A Motion for Rehearing was denied on October 15,1991, and a Notice of Intention was filed on October 25,1991. A Petition for Certiorari was filed in the Georgia Supreme Court on November 14,1991, and denied on November 27,1991.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sections 2102 and 2104. This is an appeal of a criminal conviction and sentence in a state court which was appealed to the state court of last resort.

STATUTORY PROVISIONS INVOLVED

Federal Rules of Criminal Procedure 11.

Ga. Constitution, Art. 1, Sec. 1, Par. II.

United States Constitution, Amendment 6.

STATEMENT OF FACTS

Petitioner, William Kent McCollum, was convicted of Driving Under the Influence, Fleeing and Eluding, and Reckless Driving, in the Bartow County Superior Court before the Honorable Shepherd Howell on December 17, 1990, after a nonjury trial. Petitioner was represented by Attorney William T. Elsey, a member of the State Bar of Georgia since 1971 (Tr. 6). Mr. Elsey and Petitioner had an attorney-client relationship which dated back several years (Tr. 7-11).

In July, 1989, Petitioner was arrested and charged with the instant offenses. As Mr. Elsey had disposed of Petitioner's legal matters in the past, and citing a satisfactory attorney-client relationship, Petitioner retained Mr. Elsey to represent him on these charges. Petitioner, during the period of time following his arrest on the instant charges, desired a speedy trial. In addition to Petitioner's desire to dispose of the legal matters pending against him,

there was an extra incentive to doing so. Petitioner sought employment with the United States Postal Service and to be considered further for a position there, no criminal charges can be pending against an applicant. (Tr. 10, 31, 39- 40.)

Upon learning of Petitioner's eagerness to dispose of the case, Mr. Elsey allegedly informed Petitioner that this could be best accomplished through a non-jury trial. (Tr. 10.) This fact was also purportedly communicated to Marvin McCollum, Petitioner's father, by Mr. Mickey Ray Thacker, the Chief Assistant District Attorney. (Tr. 32.) Mr. Elsey contacted Mr. Thacker, who in turn put Petitioner's case on the nonjury calendar. (Tr. 10.)

Mr. Thacker never explained to Petitioner that he was absolutely entitled to a jury trial on the pending charges. (Tr. 34.) To compound matters, Mr. Elsey, during the months preceding the December 17,1990, non-jury trial similarly failed to explain to his client that by

proceeding to dispense with the case before a Judge, he was forfeiting his right to trial by jury. (Tr. 20.) Moreover, Petitioner did not sign any document relating to a waiver of his rights to a jury trial. (Tr. 14, 46, 49.) Petitioner himself never agreed, on or off the record, to a trial by Judge. (Tr. 47.) Finally, the Honorable Shepherd Howell at no time advised Petitioner that he was waiving his rights. (Tr. 92.)

STATEMENT OF THE CASE

A non-jury trial was held on December 17, 1990, in which Petitioner was found guilty on three counts of Driving Under the Influence, Fleeing and Eluding, and Reckless Driving. Petitioner was sentenced to a misdemeanor sentence to serve 60 days in the Probation Detention Center followed by a period of 22 months on probation.

A Motion for New Trial was filed on December 21,1990. A hearing pursuant to this Motion was conducted before the Honorable Shepherd Howell on January 31,1991. The motion was summarily denied after hearing the testimony of witnesses for Petitioner and the State as well as arguments by counsel. The Court of Appeals affirmed Petitioner's conviction on September 25, 1991. A Motion for Rehearing was denied on October 15, 1991, and a timely a Notice of Intention was filed on October 25, 1991, in the Supreme Court for the State of Georgia. The Supreme Court denied Petitioner's Petition for Writ of Certiorari on November 27, 1991.

ARGUMENT

I. PETITIONER WAS STRIPPED OF HIS FUNDAMENTAL RIGHT TO A TRIAL BY JURY WHEN HE WAS TRIED SOLEY BY A JUDGE WHO FAILED TO DETERMINE IF PETITIONER HAD VOLUNTARILY AND INTELLIGENTLY WAIVED HIS RIGHT TO A JURY TRIAL.

Trial by jury has been established as the normal and preferable mode of disposing of issues of fact in a criminal case. Singer v. United States, 380 U.S. 24 (1965). When a person who stands accused of a crime is denied a fundamental constitutional right to a jury trial as guaranteed by the United States and Georgia Constitutions, strict scrutiny should be given to the case. U.S. Const., amend VI.; Ga. Const., Art. I, Sec. I, par. XI.

A. The rubric for evaluating whether a valid waiver of the right to a jury trial has been effected under Georgia law is flawed.

The procedure presently in place in Georgia ignores the importance of a defendant's right to jury trial.

There is no procedure for an on-the-record waiver of defendant's sixth amendment right. Instead, Roberts v. Greenway. 233 Ga. 473, 211 S.E.2d 764 (1975), provides two means by which the State can defend itself when a claim, like the instant one, is raised. In that case, the Supreme Court of Georgia set forth the correct standard for analyzing whether a valid waiver of a defendant's right to a jury trial has been effected.

> "[T]he burden is on the State to show the ... [waiver] was intelligently and voluntarily entered. The State may accomplish this end by two means, (I) showing on the record of the ... hearing that the defendant was cognizant of all the rights he was waiving and the possible consequences of ... [it]; or (2) fill in a silent [or incomplete] record by use of extrinsic evidence that affirmatively shows that the ... [waiver of jury trial] was knowing and voluntary."

233 Ga. 473, 475.

The first prong of the test articulated above is not met in the instant case because a record of Petitioner's alleged waiver was never made. This is

because inquiry into Petitioner's waiver of his right was never conducted and the Petitioner's views never solicited. (Hearing Tr., p. 92.) Under the second prong of Roberts, and using the record established at the hearing on Petitioner's Motion for New Trial as extrinsic evidence, the lower courts have concluded that Petitioner knowingly, voluntarily and intelligently participated in waiving his right to a jury trial. Notably, however, the extrinsic evidence relied on in this case is contradicted by testimony of equal value. Furthermore, there is no evidence that Petitioner participated in effecting the waiver. Such participation is essential under Patton v. United States, 281 U.S. 276, 312 (1929). In fact, Petitioner testified that he thought he was at a hearing. This was a reasonable assumption under the circumstances. Under the existing Roberts framework, Petitioner did not voluntarily and intelli-

gently waive his right to a trial by jury.

B. The procedure for waiving one's fundamental right to a trial by jury in the State of Georgia should comport with the requirements in Federal Rule of Criminal Procedure 11.

The procedure employed in the instant case and sanctioned in the State of Georgia is fallible for several reasons. First, the State is relieved of the duty of showing that the defendant was cognizant of the rights he was waiving. The deficiency in this procedure could be easily remedied by looking to the federal arena for direction. An on-the-record determination that the defendant is cognizant of his rights and still voluntarily waives them could be easily employed. Second, the State is permitted to fill in a silent record by use of extrinsic evidence which affirmatively shows that the waiver was voluntary. Clearly, the second method contains a tremendous margin of error. This error is illustrated in Petitioner McCollum's case. The issue of a silent record or a deficient record

could be remedied by relying on the procedure used in Federal Rule of Criminal Procedure 11 which requires the judge to address the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The federal court also is required to inquire as to whether the defendant's willingness to plead to an offense results from prior discussions between the attorney for the government and the defendant or the defendant's attorney. By personally interrogating the defendant, not only will the judge be able to ascertain the voluntariness of a defendant's decision, but he will also develop a more complete record to support his determination in any subsequent attack. McCarthy v United States, 394 U.S. 459 (1969).

C. The lower courts' analysis of Petitioner's claim that he did not voluntarily and intelligently waive his right to a trial by jury is erroneous.

The trial court, the Court of Appeals, and the Supreme Court of the State of Georgia have taken the position that because Petitioner "had attended court on several occasions waiting for his case to be tried and because in a prior criminal case he had pleaded guilty after being informed of his right to a jury trial," he participated in waiving his right to a jury trial. (Court of Appeals Order, p.2.) This type of reasoning requires inference upon inference, creating a "house of cards" which is susceptible to attack at every level. To accept the reasoning of the lower courts, first one must infer that a defendant in a criminal proceeding observes and absorbs the subtleties of all activity surrounding him/her in the short period of time prior to being summoned to trial. Not only would a defendant have to be alert to notice the events and happenings in a court of law, but he would also be assumed to understand and comprehend things that the lay person frequently finds beyond his grasp. In addition, this reasoning assumes that every defendant functions at an intellectual level which would enable him to

recognize and assess the intricacies of the criminal justice system. This is not the type of criminal justice system envisioned by the founders of our legal system and scholars of jurisprudence. Rather, courts on both the state and federal levels institute safeguards which insulate decisions made by attorneys, defendants and judges alike. No such safeguard exists in Georgia, and Petitioner was denied his Sixth Amendment right as a consequence.

WHEREFORE, Petitioner respectfully requests that this Court grant Petitioner's Petition for Certiorari and Reverse and Remand this case.

Respectfully submitted,

ROBERT G. FIERER
Attorney for Petitioner
Georgia Bar No. 259700

152 Nassau Street, N.W.
Atlanta, Georgia 30303
404/688-5500

Certificate of Service

This is to certify that I have this day served a true and correct copy of the foregoing Petition for Writ of Certiorari upon District Attorney Darrel Wilson, Cherokee Judicial Circuit, Post Office Box 907, Cartersville Georgia 30120, by placing a copy of same in the United States Mail with proper postage affixed thereto.

This 25th day of February, 1992.

_____

ROBERT G. FIERER

SUPREME COURT OF THE STATE OF GEORGIA
CLERK'S OFFICE ATLANTA
DATE: NOVEMBER 27, 1991

Robert G. Fisher
152 Nassau Street, N.W.
Atlanta ,Georgia 30303

Case No. S92C0236

WILLIAM K. McCOLLUM V. THE STATE

COURT OF APPEALS CASE NO. A91A1053

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

Very truly yours,

JOLINE B. WILLIAMS, Clerk

In the Court of Appeals of Georgia

A91A1053. McCOLLUM V. THE STATE

POPE, Judge.

Following a bench trial, defendant Kent McCollum was convicted of the offenses of driving under the influence of alcohol, fleeing and eluding arrest and reckless driving. He obtained new counsel and moved for a new trial on the ground he was denied his constitutional right to a trial by jury and was denied effective assistance of counsel. Defendant appeals the order denying his motion for a new trial.

1. At the hearing on defendant's motion for a new trial, defendant's trial counsel testified the case had appeared on the trial calendar possibly three times but had not been reached. The attorney also represented defendant in another criminal case in which a nolle prosequi was entered.. Defendant and his father informed the attorney that they were eager to have the remaining case

disposed of because defendant had a chance at obtaining a government job if no criminal charges were pending against him. The Attorney informed defendant that the only possible way to expedite the matter was to have a non-jury trial. According to the attorney, defendant voiced his consent to a non-jury trial. A non-jury trial was scheduled and at no time during the trial did the defendant raise an objection. Defendant and his father denied they consulted with the attorney about expediting the case and both testified they thought the proceeding before the judge was not a trial but merely a hearing.

"A criminal defendant must personally and intelligently participate in the waiver of the constitutional right to a trial by jury. Wooten V. State, 162 Ga. App. 719 (293 SE2d 11) (1982)." Hill V. State, 181 Ga. App. 473 (1) (352 SE2d 651) (1987). The State has the burden of proving the waiver was made intelligently and knowingly. Id. We concluded the state met its burden in this case. The record

supports the trial court's finding that the defendant was familiar with his right to a jury trial because he had attended court on several occasions waiting for his case to be tried and because in a prior criminal case he had pleaded guilty after being informed of his right to a jury trial. The record shows defendant had an incentive to wave his right to a jury trial in order to expedite the proceeding and, though the evidence was in conflict, the record supports the trial court's finding that defendant consulted with waive this right. That defendant had discussed the decision with his counsel and made no objection to the proceeding until after he received an unfavorable verdict is further evidence of his knowing waiver. See Little V. Stynchcombe, 227 Ga. 311 (1) (180 SE2D 541) (1971).

2. The record does not support defendant's contention that he was denied effective assistance of counsel by counsel's alleged failure to inform him of his right to a

jury trial. Neither does the record show defendant's trial counsel was ineffective in interviewing witnesses or preparing for trial. Because defendant failed to establish a reasonable probability that the outcome of the trial would have been different but for counsel's asserted deficiencies, ineffectiveness of counsel was not shown. See Sweetenburg V. State, 197 Ga. App. 36 (2) (397 SE2d 451) (1990).

Judgment affirmed. Birdsong, P. J., and Cooper, J., Concur.